Rule 8, Ariz. R. Crim. P. and Rule 26, Ariz. R. Crim. P.

Speedy Trial/Due Process/Sentencing: A defendant has no "right to be arrested" as soon as police have probable cause to arrest him for one crime; there is no doctrine of "sentencing manipulation" in Arizona……..……Revised 11/2009

Federal Standard

A suspect has no constitutional or statutory right to be arrested as soon as the police have probable cause to arrest him for a crime. *Hoffa v. U.S.*, 385 U.S. 293, 310 (1966). The United States Supreme Court has stated:

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

Id. [citations omitted]. In *U.S. v. Lovasco*, 431 U.S. 783 (1977) the Court explained that, because prosecutors cannot file charges without probable cause, prosecutors are under no duty to file charges as soon as probable cause exists. *Id.* at 791. "To impose such a duty 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.'" *U.S. v. Ewell*, 383 U.S. 116, 120 (1966). It would increase the likelihood of unwarranted charges being filed and increase the amount of time a defendant must await trial. *Lovasco*, 431 U.S. at 791.

Furthermore, a rule requiring law enforcement to file charges as soon as probable cause exists could make it impossible to prove guilt beyond a reasonable doubt by causing potentially fruitful sources of information to evaporate before they are fully exploited. *Id.* at 791-792. Such a rule would require courts to expend scarce resources on insubstantial cases. *Id.* at 792. "Thus, no one's interests would be well

served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so." *Id.*

In *U.S. v. Garcia*, 79 F.3d 74 (7th Cir. 1996), the defendant alleged that police violated his rights by failing to arrest him the first time he sold heroin to an undercover officer. Police did not arrest the defendant and he continued to sell heroin. Eventually, the defendant gave the police sufficient information so that they were able to arrest both the defendant and his co-conspirator/supplier. The defendant was convicted of multiple drug offenses and thus received more prison time. He appealed, arguing that this was improper "sentencing manipulation." *Id.* at 75.

The Seventh Circuit found no error, reasoning:

> [i]t is within the discretion of the police to decide whether delaying the arrest of the suspect will help ensnare co-conspirators, as exemplified by this case, will give the police greater understanding of the nature of the criminal enterprise, or merely will allow the suspect enough "rope to hang himself." Because the Constitution requires the government to prove a suspect is guilty of a crime beyond a reasonable doubt, the government "must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained."
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> The government is not the cause of [the defendant's] predicament: [the defendant] is. The government did not coerce or unduly influence [the defendant] to sell heroin. [The defendant] knew that selling heroin was illegal but persisted in violating the law. He cannot escape full liability now because the government needed additional time to understand his operation and gather information on his co-conspirator. In short, the Constitution does not protect a criminal from himself by requiring the government to arrest the criminal before he commits another crime.

Id. at 76 [internal citations omitted].

<u>Arizona Standard</u>: *State v. Monaco*

The Arizona Court of Appeals has also held that a defendant does not have a statutory "right to be arrested" if the officer is aware that the suspect has committed a crime. *State v. Monaco*, 207 Ariz. 75, 80, ¶ 16, 83 P.3d 553, 558 (App. 2004); *see also*

State v. Carroll, 111 Ariz. 216, 219, 526 P.2d 1238, 1241 (1974) ("if an officer has sufficient information from which he could make an arrest as an incident to that arrest he could make a lawful search, it is not unreasonable if the officer makes the search before instead of after the arrest …. There is no constitutional right to be arrested.") "The purpose of such a duty is the prompt and orderly administration of criminal justice, … this duty does not create an individual right to be arrested." *Id*. at 80, ¶ 17, 83 P.3d at 558. "The decision of when to arrest a person is not mandated by statute; the government 'must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained.'" *Id*., 83 P.3d at 558 (*quoting U.S. v. Baker*, 63 F.3d 1478, 1500 (9th Cir. 1995)).

In *Monaco*, the defendant sold drugs to an undercover officer five times over a two-month period. While the officer was not attempting to obtain information about other drug dealers, the officer gathered enough information to get a search warrant for Monaco's home and seized drugs and paraphernalia. Monaco was convicted of various drug offenses, and the trial court sentenced him to six concurrent terms for possession of narcotics and drug paraphernalia. *Id.* at 77, ¶ 2, 83 P.3d at 555.

Monaco appealed, arguing, among other things, that the officer breached a statutory duty under A.R.S. § 11-441(A)(2)[1] to arrest him after the first drug sale. The court disagreed, finding that the statute did "not create an individual right to be arrested." The court found that the police are permitted a level of discretion as to when

[1] That subsection says that the sheriff shall "Arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense." The Court observed that the officer in Monaco's case worked for the City of Tucson, not for the sheriff's office.

and where an arrest is made given that sufficient evidence has been acquired. *Id.* at 80, ¶ 16, 83 P.3d at 558.

Pre-indictment Delay

The Court also found that the pre-indictment delay in filing charges against Monaco did not deny him due process of law. 207 Ariz. 75, 81, ¶ 20, 83 P.3d 553, 559. "To establish that pre-indictment delay has denied a defendant due process, the defendant must show that the prosecution intentionally delayed proceedings to gain a tactical advantage over or to harass the defendant and that the defendant has actually been prejudiced by the delay." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988). A "court applying the Due Process Clause to pre-indictment delay has 'to determine only whether the action complained of … violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' and which define 'the community's sense of fair play and decency.'" *Lovasco*, 431 U.S. at 790 (*quoting Mooney v. Holohan*, 294 U.S. 103, 112 (1935) and *Rochin v. California*, 342 U.S. 165, 173 (1952)).

Monaco "argue[d] that the officer, whose actions should be subsumed under the title of the prosecution, intentionally delayed arresting him in order to gain a tactical advantage during plea bargaining or sentencing." *Monaco*, 207 Ariz. at 81, ¶ 19, 83 P.3d at 559. The Court found that the "investigative delay did not deprive Monaco of his right against pre-indictment delay." *Id*. at 81, ¶ 21, 83 P.3d at 559. "[A] defendant's being convicted of multiple crimes that he … committed is [not] the type of prejudice contemplated by the Due Process Clause." *See*, *e.g*., *Garcia*, 79 F.3d at 76 ("[T]he

Constitution does not protect a criminal from himself by requiring the government to arrest the criminal before he commits another crime").